

JUNIOR WALTER DAUGHERTY

IBLA 72-130

Decided September 22, 1972

Appeal from a rejection of Indian allotment application C-13065 covering land in a national forest.

Affirmed.

Indian Allotments on Public Domain: Generally

An application for an Indian allotment within a national forest is properly rejected where the Department of Agriculture has determined that the land is more valuable for timber production than for agricultural and grazing purposes.

Indian Allotments on Public Domain: Generally

An application for an Indian allotment within a national forest is properly rejected where the Department of Agriculture finds that the lands applied for fail to meet the requirements of the Indian Allotment Act of June 25, 1910.

APPEARANCES: Skelton & Miller, Attorneys; Regional Forester, USDA, Denver, Colorado.

OPINION BY MR. RITVO

Junior Walter Daugherty has appealed from decisions dated August 17, 1971, and, as amended, September 10, 1971, by the Colorado land office rejecting an application for an Indian Allotment for National Forest Land.

The application was filed pursuant to section 31 of the Act of June 25, 1910, 25 U.S.C. § 337 (1970), which provides:

"That the Secretary of the Interior is hereby authorized, in his discretion, to make allotments within the national forests in conformity with the general allotment laws * * * to any Indian

occupying, living on, or having improvements on land included within any such national forest who is not entitled to an allotment on any existing Indian reservation, or for whose tribe no reservation has been provided, or whose reservation was not sufficient to afford an allotment to each member thereof. All applications for allotments under the provisions of this section shall be submitted to the Secretary of Agriculture, who shall determine whether the lands applied for are more valuable for agricultural or grazing purposes than for the timber found thereon; and if it be found that the lands applied for are more valuable for agricultural or grazing purposes, then the Secretary of the Interior shall cause allotment to be made as herein provided."

The pertinent regulation provides:

1. Application.

An Indian who desires to apply for an allotment within a national forest under this act must submit the application to the supervisor of the particular forest affected, by whom it will be forwarded with appropriate report, through the district forester and Chief, Forest Service, to the Secretary of Agriculture, in order that he may determine whether the land applied for is more valuable for agriculture or grazing than for the timber found thereon.

2. Approval.

(a) Should the Secretary of Agriculture decide that the land applied for, or any part of it, is chiefly valuable for the timber found thereon, he will transmit the application to the Secretary of the Interior and inform him of his decision in the matter. The Secretary of the Interior will cause the applicant to be informed of the action of the Secretary of Agriculture.

(b) In case the land is found to be chiefly valuable for agriculture or grazing, the Secretary of Agriculture will note that fact on the application and forward it to the Commissioner of Indian Affairs.

(c) The application must be filed with the manager of the land office for the district in which the land applied for is located. He will then forward the case to the Bureau of Indian Affairs for consideration. If the Commissioner of Indian Affairs approves the application, he will transmit it to the Bureau of Land Management for issuance of a trust patent. 43 CFR § 2533.

As provided in the pertinent regulation, the application was filed with the Forest Supervisor, Pike National Forest. Again, as provided in the regulations, the officer of the Forest Service made a report to the Secretary of Agriculture (or his delegate) in order that he might "determine whether the land applied for is more valuable for agriculture or grazing than for the timber found thereon."

The Regional Forester, Rocky Mountain Region, USDA, Then, again as provided in the regulations, transmitted the application to the Secretary of the Interior (or his delegate) and informed him of his decision in the matter. The decision, in the form of a letter to the land office manager, stated:

I recommend Mr. Daugherty's application be disapproved for the following reasons:

* * * * *

2. The land is more valuable for timber production than for agricultural settlement.
3. The land is not suitable for agricultural settlement nor for grazing settlement. It will not support a family based on a grazing or farming operation.

The basis for the above conclusions are found in the Forest Supervisor's report of May 12, 1971. The land office summarized the portions of the report relating to these reasons as follows:

- a. that of the 150 acres applied for, 116 acres, or approximately 77 percent is basically timber producing land consisting of Ponderosa Pine, Spruce and Aspen, and that only 31 acres are open grazing land and three acres are meadow-type land.

- b. the soils are generally poor and highly erodible. The severe climate with its low temperatures and short grazing seasons, in hand with the poor soil, makes for a low productivity of forage for grazing.
- c. with respect to grazing use, the report states that the land has only limited use during the summer.
- d. the agricultural potential beyond summer grazing is virtually none.
- e. the overall character of the land is basically open timber land rather than agricultural.
- f. because of the unsuitability of the land and climate for growing basic forage including hay, or other agricultural crops, it would not be considered feasible for a family to make its living and support itself on the land.

It then concluded:

It is apparent from the report that the Secretary of Agriculture, acting through the Forest Service has determined that the land applied for is more valuable for National Forest purposes than for agricultural or grazing purposes. The land, therefore, fails to meet the requirements for allowance of an Indian Allotment as set forth in the previously cited Act of June 25, 1910. * * *

Daugherty later amended the description in his application. After another investigation and report, the land office rejected the amended application for the same and another reason, i.e., the Daugherty had not met the settlement requirement of the Act.

Several recent cases have considered applications for Indian allotments within national forests. It has been consistently held that an application for an allotment must be rejected when the Secretary of Agriculture has determined that the land applied for is more valuable for timber or forest purposes than for agricultural or grazing purposes. Ross A. Neugin, A-31086 (February 2, 1970), John D. Ratterree, A-31094 (April 23, 1969); Robert Minkey, et al., A-30706 (March 28, 1967).

In Ratterree the Department held:

The decisions below ruled that since the Department of Agriculture had not found the land to be more valuable for agricultural or grazing purposes than for timber the application must be denied on this ground alone, if for no other reason. This is true. Appellant has not offered any evidence to refute this, but has simply stated that the lands applied for are not "timber producing [sic] lands and never were". Any disagreement with the finding of the Department of Agriculture in this respect must be addressed to that Department as this Department must accept its Determination in this matter. Robert Minkey, et al., supra.

Inasmuch as the Department of Agriculture has determined that the lands applied for by appellant are not more valuable for agricultural or grazing purposes than for timber, we must conclude that appellant is not entitled to an allotment for this reason.

After the rejection of the application in Ratterree, supra, the Government initiated suit to eject the applicant from land claimed as an allotment. In United States v. Ratterree et al., U.S.D.C., Cent. D., Calif. Civil No. 69-929-HP, the Court held, on September 3, 1969, that the defendant has no right, title or interest in the land. Ratterree was permanently enjoined from asserting title and was required to remove from and to restore the land.

While the cited cases would seem to be determinative of the issues involved in this appeal, Daugherty contends that the land office decision is erroneous.

In his appeal, Daugherty asserts that he has met the requirements of the Act of June 25, 1910, that he has occupied and is occupying and living on the land, and that the land applied for is more valuable for agricultural or grazing purposes than for the timber found thereon.

Before the Secretary of the Interior can reach the question of whether the applicant has lived on, occupied, or improved the land, he must first receive a determination from the Secretary of Agriculture that the lands "are more valuable for agriculture or grazing

purposes than for the timber found thereon." In the absence of such a determination there is no need to consider the question of occupancy. Curtis D. Peters, 6 IBLA 5 (1972). Therefore the consideration of the appeal will be limited to the adequacy of Agriculture's determination as to the character of the land applied for.

Daugherty recognizes that the Regional Forester determined that the land was not suitable for agriculture or grazing and was basically timber producing and that the land office relied solely on the Forester's conclusion in making its decision.

He alleges that this procedure is incorrect because it takes away discretion of the Secretary of the Interior and he asks for a hearing to be held by the Department of the Interior. The difficulty with this argument is that the statute and the regulation based on it plainly state that the determination of the relative values of the land is to be made by the Secretary of Agriculture, not by the Secretary of the Interior. Interior can act only on the basis of Agriculture's report. The regulation plainly states that if the Secretary of Agriculture finds the land ineligible for allotment he will inform the Secretary of Interior of his decision and the Secretary of the Interior will cause the applicant to be informed of the action of the Secretary of Agriculture. As the cases cited above pointed out, if Daugherty disagrees with Agriculture's conclusion, he must seek a remedy there, not in the Department of the Interior. 1/

Daugherty further contends that Agriculture in determining the relative values of the land uses the Multiple Use Act (Act of June 12, 1960; 16 U.S.C. § 528 et seq. (1970)) concept rather than using the words of the Act of June 25, 1910, i.e. "timber found thereon." He points out that the land office decision states that "the Secretary of Agriculture * * * has determined that the land applied for is more valuable for National Forest purposes than

1/ The provisions of the Mineral Leasing Act for Acquired Lands, 30 U.S.C. §§ 351-359 present an analogous situation. It authorizes the leasing of mineral deposits in acquired lands only "with the consent of the head of the executive department, independent establishment, or instrumentality having jurisdiction over the lands containing such a deposit * * * and subject to such conditions as that official may prescribe * * *." Id. §§ 352.

The Department has often held that it is not within the authority of this Department to pass upon the reasonableness of, or necessity for the conditions which are imposed by the agency having jurisdiction over the acquired lands and that Interior is without authority to issue a lease under terms not acceptable to the administering agency. Max Barash, A-31057 (November 18, 1969).

for agricultural or grazing purposes," and requests that the decision should be made solely on the value of the land as timber producing land. He also contends it is incorrect to consider whether it will support a family on a year round basis in determining the relative value of the land for agriculture or grazing and the timber found thereon. The decision, he concludes, should be based solely on whether the land can be better used for agriculture, grazing, or timber production.

These contentions are not persuasive for several reasons. First, although the land office decision summarizes Agriculture's conclusion as a determination "that the land applied for is more valuable for National Forest purposes than for agricultural or grazing purposes," the Regional Forester's report gave as a reason for rejection:

2. The land is more valuable for timber production than for agricultural settlement.

If we are to look behind the recommendation for rejection at all, it is the report itself, not the land office's gloss which must be examined.

"Timber production" is a much more limited concept than National Forest purposes. It is, of course, not an exact recitation of the statutory language, but it is within its perimeter. To hold otherwise could lead to unfortunate consequences. For example, if only the value of the timber found on the land at the time of application is considered, any timber area that has been harvested would become eligible for allotment, all else being regular, as soon as the cutting was completed, no matter how suitable the land was for replanting as part of a sustained yield forest management plan. Accordingly, it is our conclusion that a finding that land is more valuable for timber production is encompassed by the statutory language of more valuable for "the timber found thereon."

There is, in addition, a more basic objection to Daugherty's contentions. As noted above, Daugherty filed an amendment to his application, changing the land description. In the amendatory decision of September 10, 1971, the land office referred to a supplemental report of the Forest Service commenting on the 25 acres added to the application by the amendment. It then concluded that "The original determination that the land in the application is more suitable for timber production than for agricultural or grazing use remains unchanged."

This finding is consonant with the reason, quoted above, given by the Forest Service in its earlier letter to the land office. More important in his letter commenting on the amended application, the Regional Forester stated:

I recommend this amended application be disapproved, because the lands described fail to meet the requirements of the Indian Allotment Act of June 25, 1910.

Since to be eligible for allotment national forest land must be more valuable for agricultural or grazing purposes than for the timber found thereon, a conclusion that land fails to meet the requirements of the Act can only mean that it is not "more valuable for agricultural or grazing purposes than for the timber found thereon."

As we have seen, this determination is committed by statute to the Secretary of Agriculture and this Department must accept it.

Thus, since the Secretary of Agriculture has not determined that the lands are of the character which the statute makes available to Indian allotment, the application must be rejected.

In view of the conclusions set out above, a hearing would serve no purpose and appellant's request for one is denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision below is affirmed.

Martin Ritvo
Member

We concur:

Douglas E. Henriques
Member

Anne Poindexter Lewis
Member

